No. 96-1866

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

ALIDA STAR GEBSER and ALIDA JEAN McCULLOUGH,

Petitioners,

v.

LAGO VISTA INDEPENDENT SCHOOL DISTRICT,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF NATIONAL WOMEN'S LAW CENTER, AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, CALIFORNIA WOMEN'S LAW CENTER, *et al.* AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

(Additional *Amici* Listed Inside Cover)

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Amici curiae are organizations dedicated to the achievement of equality of opportunity for women and girls. Descriptions of the individual *amici* organizations and their interests in this case are set forth in the appendix[1]

SUMMARY OF ARGUMENT

In *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60, 75 (1992), this Court recognized that a teacher's sexual harassment of a student constitutes a form of sex discrimination that is prohibited by Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688. This case requires the Court to determine what standard governs a school's responsibility for sexual harassment by its teachers. In *Franklin*, the Court looked to the law under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, for guidance in construing Title IX's application to sexual harassment. *Id.* It should do the same here.

Drawing on principles of institutional liability established in Title VII cases, and in recognition of the realities of sexual harassment in schools, this Court should hold schools liable for sexual harassment where: (1) the harasser acted as an agent of the school by relying on the apparent authority of the school or by using the authority delegated from the school to accomplish the harassment; or (2) the school knew or should have known of the

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[1] The parties' written consent to the filing of this brief has been filed with the Court. No counsel for any party authored this brief in whole or in part, and no person or entity other than the *amici curiae* and their counsel made any monetary contribution to the preparation or submission of this brief.

harassment, yet failed to take prompt and appropriate corrective action. In applying the second standard, a school's failure to adopt and disseminate effective policies and procedures for addressing sexual harassment should establish constructive notice of any harassment that does occur, because the school failed to take reasonable steps to find out about the harassment.

Principles of agency law, which courts have long applied to determine employer liability for sexual harassment under Title VII, are no less applicable to claims challenging sexual harassment under Title IX. The Court in *Franklin* implicitly recognized this: in construing Title IX to prohibit sexual harassment, the Court relied on *Meritor Savings Bank* v. *Vinson*, 477 U.S. 57 (1986), which directed courts to look to agency principles in determining employer liability for sexual harassment under Title VII. The application of agency principles under Title IX is particularly compelled by the extreme vulnerability of students to school authority and the special role that this authority plays in virtually all teacher-student relations.

Under established agency principles, a federally funded school is liable under Title IX for a teacher's sexual harassment of a student if the harassment was facilitated, either expressly or implicitly, by the teacher's actual or apparent authority as an employee of the school. This standard of liability, which is set forth in Section 219(2)(d) of the *Restatement (Second) of Agency*, properly recognizes the pervasive role of the school's delegated authority in teacher-student relationships. As much as sexual harassment by a supervisor in the workplace is facilitated by the supervisor's authority over employees, s*ee Meritor*, 477 U.S. at 76-77 (Marshall, J., concurring), the power exercised by teachers over students, accentuated by differences in age, is at least, if not more, compelling.

Relying in part on standards developed to govern sexual harassment in the workplace, and recognizing that students deserve at least as much protection from such discrimination as employees, the Department of Education's Office for Civil Rights ("OCR") has issued a policy guidance interpreting Title IX to hold schools responsible for sexual harassment aided by a teacher's actual or apparent authority. As the agency charged with enforcing Title IX, OCR is entitled to deference in its interpretation.

Holding schools liable for sexual harassment aided by a teacher's actual or apparent authority creates the incentives necessary to achieve Congress' intent that Title IX root out all forms of sex discrimination in federally funded educational programs and activities. Application of the Section 219(2)(d) standard will prompt schools to reach out to both students and teachers to ensure a clear understanding that any act of sexual harassment will not be tolerated. Indeed, held to the Section 219(2)(d) standard, schools will have strong incentive to prevent sexual harassment before it occurs.

In addition to being liable for the discriminatory acts of their agents, schools also must be deemed liable for their own conduct under Title IX. If a school fails to provide reasonable measures for reporting and adequately addressing incidents of sexual harassment, and such harassment occurs, the school should be liable under Title IX because it should have known about and responded to the harassment. Sexual harassment in schools is eminently foreseeable. Accordingly, any school that fails to provide meaningful channels for reporting and responding to sexual harassment must be deemed to have constructive notice of any harassment that occurs.

Holding schools liable for failing to establish antiharassment policies and meaningful reporting procedures serves, like the Section 219(2)(d) standard, to further Congress' goal that Title IX eliminate all forms of sex discrimination in federally funded educational programs and activities. Experience has shown that the adoption by schools of clear sexual harassment policies and adequate reporting procedures can reduce the incidence of sexual harassment. The Fifth Circuit, by rejecting a constructive notice standard of liability under Title IX, has undermined the statute's intended prompting of such measures and has created the perverse incentive for schools to ignore indicia of sexual harassment and discourage students from reporting them. Congress cannot possibly have intended this result.

Consistent with the language and legislative history of Title IX, this Court's own precedent, and the experienced judgment of the OCR, the Court should reverse the decision below and hold that the Lago Vista Independent School District may be liable under Title IX for the sexual harassment of Alida Star Gebser both because of its failure to establish meaningful policies and procedures for reporting and addressing sexual harassment, and because the harassment was aided by the actual or apparent authority of the school district's employee.

ARGUMENT

I. EDUCATIONAL INSTITUTIONS SHOULD BE LIABLE UNDER TITLE IX FOR SEXUAL HARASSMENT THAT IS FACILITATED BY ACTUAL OR APPARENT INSTITUTIONAL AUTHORITY

Title IX imposes liability on institutions for the purpose of eradicating sexual discrimination in education.

Like any statute, Title IX must be interpreted in light of the realities of the contexts to which it applies. With respect to sexual harassment of students by teachers, such as that suffered by Alida Star Gebser in this case, Title IX's efficacy depends on a liability standard that holds schools accountable for a teacher's discriminatory use of his or her actual or apparent authority. The application of such a standard is imperative to achieve the goals underlying Title IX.

A. This Court's Jurisprudence Supports The Application of Agency Principles To Hold Schools Liable for Teacher-Student Sexual Harassment

In *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), this Court held that Title IX supports a damages remedy for teacher-student sexual harassment. The Court based this holding on a careful review of the legislative history of Title IX and on its earlier determination in *Meritor Savings Bank* v. *Vinson*, 477 U.S. 57 (1986), that sexual harassment is a form of intentional discrimination. *Franklin*, 503 U.S. at 75 (quoting *Meritor*, 477 U.S. at 64).

The *Franklin* Court's reliance on *Meritor* strongly suggests that agency principles properly apply to determine liability under Title IX. In *Meritor*, the Court stated that agency principles should guide the determination of liability for "hostile environment" sexual harassment under Title VII. *Meritor*, 477 U.S. at 65-66.[2] In *Franklin*, after

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[2] This Court is also currently reviewing *Faragher* v. *City of Boca Raton*, 111 F.3d 1530 (11th Cir. 1997), which presents the issue of how agency principles apply to hold employers liable for sexual harassment by a supervisor under Title VII. For the reasons discussed below, students are entitled to at least as much

reiterating its finding in *Meritor* that "'when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor "discriminate[s]" on the basis of sex,'" the Court stated: "We believe the same rule should apply when a teacher sexually harasses and abuses a student." *Franklin*, 503 U.S. at 75 (quoting *Meritor*, 477 U.S. at 64).

Following *Franklin*, almost all of the federal circuit courts that have addressed Title IX claims have interpreted the statute to impose liability for sexual harassment based on principles of agency similar to those applicable under Title VII.[3] The lower courts' application of agency principles under Title IX reflects a proper understanding of this Court's jurisprudence as articulated not only in *Franklin* itself, but also in the *Meritor* opinion upon which *Franklin* relies.

The rationale behind the application of agency principles in *Meritor* – the pervasiveness of an employer's authority, both express and implicit, over a subordinate's actions, and the responsibility of the employer to exercise appropriate control over the work environment – is at least

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protection from sexual harassment in school as are employees in the workplace. Indeed, the particular vulnerabilities of students may warrant providing even greater protection under Title IX.

[3] *See, e.g., Lipsett* v. *University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988); *Murray* v. *New York Univ. College of Dentistry*, 57 F.3d 243 (2d Cir. 1995); *Brzonkala* v. *Virginia Polytechnic Inst.*, 1997 WL 785529 (4th Cir. 1997); *Doe* v. *Claiborne County*, 103 F.3d 495 (6th Cir. 1996); *Kinman* v. *Omaha Pub. Sch. Dist.*, 94 F.3d 463 (8th Cir. 1996); *Oona, R.S.* v. *McCaffrey*, 122 F.3d 1207 (9th Cir. 1997); *cf. Seamons* v. *Snow*, 84 F.3d 1226 (10th Cir. 1996). *But see Rosa H.* v. *San Elizario Indep. Sch. Dist.*, 106 F.3d 648 (5th Cir. 1997); *Smith* v. *Metropolitan Sch. Dist.*, 128 F.3d 1014 (7th Cir. 1997).

as, if not more, compelling in the educational context as in the context of the workplace. In *Meritor*, Justice Marshall explained why "hostile environment" harassment should be actionable under agency principles just as are other forms of sexual discrimination:

> A supervisor's responsibilities do not begin and end with the power to hire, fire, and discipline employees, or with the power to recommend such actions. Rather, a supervisor is charged with the day-to-day supervision of the work environment and with ensuring a safe, productive workplace. There is no reason why abuse of the latter authority should have different consequences than abuse of the former. In both cases it is the authority vested in the supervisor by the employer that enables him to commit the wrong: it is precisely because the supervisor is understood to be clothed with the employer's authority that he is able to impose unwelcome sexual conduct on subordinates. There is therefore no justification for a special rule, to be applied only in "hostile environment" cases, that sexual harassment does not create employer liability until the employee suffering the discrimination notifies other supervisors. No such requirement appears in the statute, and no such requirement can coherently be drawn from the law of agency.

Meritor, 477 U.S. at 76-77 (Marshall, J., concurring).

Justice Marshall's reasoning regarding the application of agency standards to hostile environment sexual harassment under Title VII is poignantly apt in the Title IX context. Unless agency principles apply to hold schools liable for sexual harassment of students, schools would owe

a greater duty to protect their employees from sexual harassment under Title VII than they owe their students under Title IX. None of the differences between the school and work context justify such a result. Schools are under a legal duty to supervise and care for minor students.[4] Even beyond those levels at which students are required to attend school, "a teacher occupies a position of power over students, and the power of that position is sanctioned and enforced by the school."[5] The institutional authority inherent in the school setting extends to virtually all interactions between teachers and students, and "is accentuated by the age difference between student and teacher and the roles the teacher must play – educator, guardian, role model, mentor, and even parental figure."[6]

In this case, Alida Star Gebser perceived her harasser, Frank Waldrop, as her mentor. She looked to him for guidance and advice. His institutional power to help her advance in school, and in particular to attend college, curtailed her ability to object to his advances. Unquestionably, the authority vested in Waldrop by the school district played a facilitating role in the harm Gebser suffered in this case. *See* Petitioner's Statement of Facts.

In the decision below, the Fifth Circuit ignored the wealth of authority justifying the application of agency principles under Title IX and reiterated its erroneous reasoning in *Rosa H.* v. *San Elizario Independent School*

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[4] Carrie N. Baker, Comment, *Proposed Title IX Guidelines on Sex-Based Harassment of Students*, 43 Emory L.J. 271, 291 (1994).

[5] Neera Rellan Stacey, *Seeking A Superior Institutional Liability Standard Under Title IX for Teacher-Student Sexual Harassment*, 71 N.Y.U. L. Rev. 1338, 1372 (1996).

[6] *Id.* at 1373.

District, 106 F.3d 648 (5th Cir. 1997), that the application of agency principles under Title IX would be inconsistent with this Court's decision in *Franklin*. The Fifth Circuit's reasoning reflects a fundamental misunderstanding of this Court's analysis in *Franklin*.

In *Rosa H.*, the Fifth Circuit misread *Franklin* to limit school liability for damages under Title IX to cases where the school itself intended to discriminate. But the Court's discussion of "intentional" discrimination in *Franklin* did not pertain to any standard of liability based on the subjective intent of a school district itself to discriminate. Rather, that discussion related to the question, previously analyzed in *Guardians Association* v. *Civil Service Commission*, 463 U.S. 582 (1983), whether damages are available in cases involving disparate impact, as opposed to disparate treatment, claims. *See Guardians*, 463 U.S. at 602-03. *See also Pandazides* v. *Virginia Bd. of Educ.*, 13 F.3d 823, 830 n.9 (4th Cir. 1994) (rejecting the argument that a school board must itself have acted with discriminatory intent to be liable for damages because that argument "misconstrues the use of the term 'intent,'" and, "[a]s the various opinions in *Guardians* indicate, 'intentional discrimination' is treated as synonymous with discrimination resulting in 'disparate treatment,' which contrasts with 'disparate impact.'" (citing *Guardians*, 463 U.S. at 584 n.2)). The *Franklin* Court's reliance on *Guardians*, *see Franklin*, 503 U.S. at 74-75, reflects the Court's understanding that sexual harassment claims belong in the category of disparate treatment cases.

Because sexual harassment is by definition intentional discrimination — the person harassed would not have been harassed but for her gender — the concern about holding funding recipients liable for damages for disparate impact discrimination simply does not arise in cases involving

claims of sexual harassment.[7] The Fifth Circuit's reliance on *Franklin's* reference to "intentional" discrimination as a basis for rejecting agency principles under Title IX is therefore misplaced.[8]

B. Schools Should Be Liable for Sexual Harassment by Teachers Under the Standard Set Forth in Section 219(2)(d) of the Restatement of Agency

In the Title IX context, agency principles require holding schools liable for discrimination by teachers who use their authority to sexually harass their students. Under Section 219(2)(d) of the *Restatement (Second) of Agency* ("Section 219(2)(d)"), a school is liable for the unlawful acts of an employee who either (1) relies on the apparent authority of the school, or (2) is aided in accomplishing those acts by his or her relation to the school, regardless of

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[7] *See, e.g., Landgraf* v. *USI Film Products*, 511 U.S. 244, 264 (1994) (treating sexual harassment as intentional discrimination under Section 102 of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1072-74, 42 U.S.C. § 1981(a); *Henson* v. *City of Dundee*, 682 F.2d 897, 905 n.11 (11th Cir. 1982) (recognizing sexual harassment as a form of disparate treatment under Title VII); *Katz* v. *Dole*, 709 F.2d 251, 255 (4th Cir. 1983) (same) ; *Andrews* v. *City of Philadelphia*, 895 F.2d 1469, 1482 n.3 (3d Cir. 1990) (recognizing sexual harassment as a form of intentional discrimination in the context of an equal protection claim).

[8] Because sexual harassment is intentional discrimination, the Court in this case, as in *Franklin*, need not address whether Title IX was enacted pursuant to the Spending Clause of the Constitution, Section 5 of the Fourteenth Amendment, or both. *See Franklin*, 503 U.S. at 75 n.8.

whether the school had notice of the wrongful acts.[9] The use of this standard appropriately recognizes the realities of teacher-student relations, the role of school authority in such relations, and the purposes of Title IX.

When a teacher engages in "quid pro quo" sexual harassment — *e.g.*, by threatening to lower a student's grades if the student does not submit to sexual advances — the harassment plainly is aided by the teacher's relation to the school (the teacher's actual authority to lower grades) and the school is therefore liable for the use of its authority to harass.[10] In cases of "hostile environment" sexual harassment, such as Alida Star Gebser's case here, the use of the teacher's authority to harass is no less powerful and insidious, and equally compels school liability under Section 219(2)(d). The two types of harassment — not

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[9] Section 219(2)(d) provides that a master is liable for the torts of his servants acting outside the scope of their employment when the servant "purported to act or speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation." *Restatement (Second) of Agency* § 219(2)(d) (1958).

[10] *See Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12034, 12039 (Mar. 13, 1997) [hereinafter *OCR Policy Guidance*]; *see also Kadiki* v. *Virginia Commonwealth Univ.*, 892 F. Supp. 746, 752 (E.D. Va. 1995) ("[A] professor is analogous to a work place supervisor, and knowledge of any *quid pro quo* harassment of a student by a professor should be imputed to his employer."); *cf. Horn* v. *Duke Homes*, 755 F.2d 599, 603-06 (7th Cir. 1985) (holding that Title VII imposes strict liability on an employer for sexual harassment by a supervisory employee).

always readily distinguishable — should be governed by the same standards.[11]

1. The Extensive Authority Teachers Wield Over Their Students Supports Liability Under Section 219(2)(d)

As the Second Circuit recognized in *Kracunas* v. *Iona College*, 119 F.3d 80, 88 (2d Cir. 1996), the power wielded by school teachers over their pupils is as great, if not greater, than the power of supervisors over their employees.[12] In *Kracunas*, the court held that the Section 219(2)(d) standard appropriately applies in the Title IX context. Accordingly, "if a [college] professor has a supervisory relationship over a student, and the professor capitalizes upon that supervisory relationship to further the harassment of the student, the college is liable for the

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[11] *See OCR Policy Guidance* at 12039; *cf. Jansen* v. *Packaging Corp. of America*, 123 F.3d 490, 566-70 (7th Cir. 1997) (*en banc*) (Wood, J., dissenting) (recognizing the overlapping nature of *quid pro quo* and hostile environment harassment in the Title VII context) *petition for cert. filed*, 66 U.S.L.W. 3283 (Sept. 29, 1997) (No. 97-569); Equal Employment Opportunity Commission, *Policy Guidance On* Current Issues of *Sexual Harassment*, Notice No. N-915-050, *EEOC Compliance Manual* (CCH) ¶ 3114 (Mar. 19, 1990) (same).

[12] *See also Patricia H.* v. *Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288, 1292-93 (N.D. Cal. 1993) ("The distinctions between the school environment and the workplace serve only to emphasize the need for zealous protection against sex discrimination in the schools"); Stacey, *supra* note 5, at 1354 (citing numerous reasons for requiring a stricter standard of liability for institutions in the educational context than that required for employers in the workplace); *Baker*, *supra* note 4, at 290-93.

professor's conduct." Id. at 88. Other lower courts have reached similar conclusions. See, e.g., *Hastings* v. *Hancock*, 842 F. Supp. 1315, 1319-20 (D. Kan. 1993) (finding Section 219(2)(d), as applied by the Tenth Circuit to claims under Title VII, applicable to a Title VII claim regarding teacher-student sexual harassment within a vocational training school).

In general, the courts have acknowledged the significance of the authority that teachers exercise over their students. The Seventh Circuit recently emphasized the implications of this power with respect to teacher-student sexual harassment in its opinion in *Mary M.* v. *North Lawrence Community School Corp.*, No. 97-1285, 1997 WL 763470 (7th Cir. Dec. 12, 1997):

> "The ability to control and influence behavior exists to an even greater extent in the classroom than in the workplace, as students look to their teachers for guidance as well as for protection. The damage caused by sexual harassment also is arguably greater in the classroom than in the workplace, because the harassment has a greater and longer lasting impact on its younger victims, and institutionalizes sexual harassment as accepted behavior. Moreover, as economically difficult as it may be for adults to leave a hostile workplace, it is virtually impossible for children to leave their assigned school. Finally, '[a] nondiscriminatory environment is essential to maximum intellectual growth and is therefore an integral part of the educational benefits that a student receives. A sexually abusive environment inhibits, if not prevents, the harassed student from developing her full intellectual potential

and receiving the most from the academic program.'"

Id. at *7 (quoting *Davis* v. *Monroe County Bd. Of Educ.*, 74 F.3d 1186, 1193 (11th Cir. 1996) (citation omitted), *rev'd*, 120 F.3d 1390 (1997)).

Scholars who have studied sexual harassment on college campuses have found that teachers have power over their students in a number of ways. At the most fundamental level, professors award grades, write recommendations, and often shape the attitudes of professorial colleagues toward a particular student.[13] In addition, students' "adolescent idealism" often leads them to exaggerated views of a professor's wisdom and knowledge.[14] Further, because teachers have the power to "motivate students to master material or convince them to give up," professors are well-positioned to diminish or enhance a student's self-esteem.[15] These same considerations apply with even greater force to interactions between teachers and students in elementary and secondary schools.

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[13] Sue Rosenberg Zalk, *Men in the Academy: A Psychological Profile of Harassers, in Sexual Harassment on College Campuses* 81, 85 (Michele A. Paludi, ed. 1996); Vita C. Rabinowitz, *Coping with Sexual Harassment, in Sexual Harassment on College Campuses* 199, 200 (Michele A. Paludi, ed. 1996).

[14] Zalk, *supra* note 13, at 85; Rabinowitz, *supra* note 13, at 201.

[15] Zalk, *supra* note 13, at 86; Robert J. Shoop and Debra L. Edwards, *How to Stop Sexual Harassment in Our Schools* 62 (1994).

Indeed, for adolescents, "teachers are routinely seen by students as parent figures rather than peers."[16] Often, in their haste to "pull away from their parents," adolescent students project teachers into images of "perfection," and teachers who sexually harass their students capitalize on this.[17] Young students' immaturity -- both mental and sexual -- also exacerbates their vulnerability to teacher harassers. Elementary school-age children often are neither "cognitively capable of discerning the impropriety of a teacher's conduct nor capable of objecting to such conduct."[18] Moreover, students are not taught to scrutinize their teachers' behaviors for indications of impropriety. Rather, students are taught to obey their teachers just as they are instructed to obey other adults.[19] Aggregately, these factors elevate teachers to a unique position of authority in the minds of students.

The nature of the education process bears out students' subjective impressions and vests teachers with

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[16] Stefanie H. Roth, *Sex Discrimination i01: Developing a Title IX Analysis for Sexual Harassment in Education*, 23 J.L. & Educ. 459, 510 (1994).

[17] H.J. Cummins, *What's Normal? – And What's Not*, Newsday, May 27, 1995, at B1; *see also* Roth, *supra* note 16, at 511 (noting that many young women "ascribe exaggerated notions of superior experience, maturity, wisdom, and sophistication to their teachers and often accept everything that the teachers espouse as true or correct").

[18] Roth, *supra* note 16, at 510. *See also* Stacey, *supra* note 5, at 1372-73 ("Students, particularly those in elementary school, look to teachers for guidance and approval.").

[19] *See* Roth, *supra* note 16, at 510 (noting that young students "are taught to comply with the requests of parental authority figures, especially when they have been conditioned to believe that such figures would not do anything to harm them").

extensive actual authority over students' development and achievement. As one commentator has observed:

> By granting teachers the autonomy to define the contours of their professional role and encouraging the development of trusting relations between faculty and students as part of the learning process, educational institutions delegate enormous power to their instructors . . . . By further granting teachers the authority to evaluate and give feedback on students' work, schools heighten their instructors' power over their students.[20]

In this case, Waldrop's role as Gebser's mentor permeated all aspects of their relationship. Whether on campus or off, Gebser associated Waldrop with her school, and her responses to his advances were infected by that association. Particularly given her age, Gebser could not mentally sever Waldrop's harassment from his role as a teacher, and as a result, lacked the psychological basis to reject his advances or to report them without encouragement from other school authorities.

Given the realities of the teacher-student relationship in this case and in all others, the two-pronged basis for liability under Section 219(2)(d) -- for wrongs undertaken with apparent authority or facilitated by the wrongdoer's relation to the school -- properly applies under Title IX.[21]

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[20] *Id.* at 512-13.

[21] *See* Stacey, *supra* note 5, at 1373 ("The school imparts to its teachers the right to monitor and affect the day-to-day lives of the students. This delegation of control over the student, along with the unique teacher-student relationship, provides a basis for imposing liability on schools for the sexual misconduct of their teachers." (footnote omitted)).

Holding federally funded schools liable for sexual harassment aided by a teacher's actual or apparent authority will provide these institutions with an economic stake in implementing meaningful preventive policies and procedures, including counseling, monitoring, and appropriate punitive measures. Enforcing Title IX under the Section 219(2)(d) standard will encourage institutions such as the Lago Vista Independent School District to reach out to students like Gebser with advice about how to respond to sexual harassment *before* it occurs. Application of the Section 219(2)(d) standard thus has the socially desirable effect of helping deter sexual harassment and reduce its harms and associated costs. Plainly, schools are in a better position than students to reduce that risk. By allocating risk to the party best positioned to bear it, the Section 219(2)(d) standard therefore serves Congress' objective that Title IX eradicate all forms of sexual discrimination in federally funded education.[22]

2. *OCR's Adoption of the Section 219 (2)(d) Standard Is Entitled to Judicial Deference*

The Office for Civil Rights of the Department of Education ("OCR") has adopted the Section 219(2)(d) standard as part of its policy guidance construing Title IX's application to sexual harassment.[23] The OCR policy

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[22] *See* Stacey, *supra* note 5, at 1379; *cf. Horn* v. *Duke Homes*, 755 F.2d at 604 (relying on risk allocation theory in the context of Title VII and emphasizing that "[i]t was Congress' judgment that employers, not the victims of discrimination, should bear the cost of remedying and eradicating employment discrimination").

[23] *OCR Policy Guidance* at 12039.

guidance "reflect[s] longstanding OCR policy and practice."[24]

The OCR policy guidance merits substantial deference by this Court. As the agency charged with Title IX's enforcement, the OCR is the government body in the best position to determine the statute's proper contours. In *Meritor*, the Court recognized that the Title VII policy guidelines of the Equal Employment Opportunity Commission, the agency charged with enforcing Title VII, "'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'"[25] The general principle of judicial deference to an agency's interpretation of its own regulations and the statute it is charged to enforce also counsels in favor of deference to the OCR policy guidance. *See Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984); *see also Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 565-70 (1980) (according deference to an agency's "official staff commentary" regarding statutory interpretation).

The Fifth Circuit, while refusing to apply the Section 219(2)(d) standard in *Rosa H.*, acknowledged in that case its position that "[i]n general, '[w]hen interpreting

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[24] *OCR Policy Guidance* at 12035. Notably, like the policy guidance on sexual harassment under Title IX, the OCR's policy guidance on racial harassment under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000d-7, the legislative precursor to Title IX, *see Cannon*, 441 U.S. at 694, adopts principles of agency applicable under Title VII. *See Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance*, 59 Fed. Reg. 11448 (1994).

[25] *Meritor*, 477 U.S. at 65 (quoting *General Elec. Co.* v. *Gilbert*, 429 U.S. 125, 141-42 (1976), quoting *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944)).

title IX we accord the OCR's interpretations appreciable deference.'" *Rosa H.*, 106 F.3d at 657 (quoting *Rowinsky* v. *Bryan Independent School District*, 80 F.3d 1006, 1015 n.20 (5th Cir.), *cert. denied*, 117 S. Ct. 165 (1996)). However, the Fifth Circuit declined to accord such deference in *Rosa H.* on the ground that such action would involve applying the guidelines "retroactively." *Id.* This rationale ignores the fact that the OCR policy guidelines reflect the agency's longstanding interpretation of Title IX. The recent publication of the final guidelines is not a barrier to following the agency's interpretation in this case.[26]

C. Holding Schools Liable for Sexual Harassment by Their Agents Is Consistent with the Broad Language and the Legislative History of Title IX

The application of agency principles to hold schools liable for sexual harassment by teachers who misuse their authority is further supported by the broad scope and purpose of Title IX. Title IX focuses on the protected individual's rights, rather than on the perpetrator of the discriminatory acts.[27] This focus places responsibility on

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[26] *Cf. Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 457-58 (1978) ("[T]he longstanding administrative construction of a statute should 'not be disturbed except for cogent reasons.'") (quoting *McLaren* v. *Fleischer*, 256 U.S. 477, 481 (1921)); *Cowen* v. *Bank United of Texas FSB*, 70 F.3d 937, 943 (7th Cir. 1995) (rejecting objection to reliance on Federal Reserve Board "staff commentary" issued subsequent to alleged banking law violation because "the objection based on retroactivity falls away when the commentary . . . purported to clarify rather than to change existing law").

[27] Title IX provides: "No Person in the United States shall, on the basis of sex, be excluded from participation in, be denied

recipients of federal funds to provide a nondiscriminatory educational environment, and is inconsistent with a standard of liability that holds recipients accountable only for the discriminatory actions of their governing boards, and not for the acts of their agents.

In *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), this Court emphasized the significance of Title IX's focus on individual rights in finding that the statute provides for a private right of action. *See id.* at 690-93. The Court in *Cannon* noted that, during the legislative process that led up to the enactment of Title IX, an alternative wording was proposed that would have proscribed "any grant . . . [to] any institution of higher education . . . unless the application . . . for the grant . . . contains assurances . . . that any such institution . . . will not discriminate on the basis of sex in the admission of individuals." *Id.* at 693 n.14. The Court found Congress' rejection of this alternative language persuasive with respect to the inference of a private right of action. Similarly, the rejection of the alternative language and the statute's emphasis on protection for individuals from any sex-based discrimination under federally funded educational programs and activities indicate that Congress did not intend to relieve a school from responsibility for the discriminatory actions of individuals whom it has empowered to act on its behalf.

There is no basis for believing that Congress intended to provide students with less protection from discrimination under Title IX than it provided employees under Title VII. Indeed, by expressly defining a key purpose of Title IX as extending the protections of Title VII to the educational

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the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." 20 U.S.C. § 1681(a).

setting, the House Report on Title IX suggests that Congress intended similar standards of institutional liability to apply under both statutes. The House report specifically states that:

> One of the single most important pieces of legislation which has prompted the cause of equal employment opportunity is Title VII of the Civil Rights Act of 1964 . . . . Title VII, however, specifically excludes educational institutions from its terms. [Title IX] would remove that exemption and bring those in education under the equal employment provision.[28]

The fact that Title IX, unlike Title VII, does not use the term "agent," does not counsel against the application of agency principles under Title IX. Indeed, the breadth of Title IX's application to "any educational program or activity" indicates that the term "agent" would have been superfluous to render educational institutions liable for sexual harassment occurring, with or without the institution's knowledge, in the context of such programs and activities. *Kadiki* v. *Virginia Commonwealth University*, 892 F. Supp. 746, 754 (E.D. Va. 1995) (Title IX governs "any operation" of an educational institution and therefore "it is essentially inconsequential that Title IX does not expressly adopt agency principles"); *Hastings*, 842 F. Supp. at 1318 (rejecting the argument that the absence of the word "agent" in Title IX implies a barrier to the application of agency principles). If any implication is to be drawn from the absence of the word "agent" in

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[28] H.R. Rep. No. 92-554 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2462, 2512.

Title IX, it would be that institutional liability for sexual harassment is broader under Title IX than under Title VII.[29]

Congress has explicitly emphasized, through amendments to Title IX, that the statute's prohibition against discrimination "under any educational program or activity receiving Federal financial assistance" must be accorded a broad interpretation. In 1988, for example, in defining "program or activity" as "all the operations of . . . a college [or] university," Congress expressly directed that Title IX be accorded a "broad, institution-wide application."[30] This affirmative step by Congress strongly suggests that its intent would be thwarted if Title IX were narrowly read to insulate schools from liability for the discriminatory acts of their agents.[31]

Informed by Congress' deliberate acts, this Court and the lower courts have repeatedly stressed that the legislative history of Title IX dictates that the statute must be interpreted to the full breadth of its language. In addition to its interpretation of Title IX's breadth in *Cannon*, this Court

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[29] As this Court observed in *Meritor*, the inclusion of the reference to "agent" in Title VII implies a *limitation* on the liability of an employer for the acts of its employees: "Congress' decision to define 'employer' to include any 'agent' of an employer . . . surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible." *Meritor*, 477 U.S. at 72. Title IX, in contrast, includes no such limitation.

[30] 20 U.S.C. § 1687 (hist. and stat. notes).

[31] *See also* H.R. Res. 190, 98th Cong. (1983); 129 Cong. Rec. H33104 (1983). (Congressional resolution stating that Title IX and its regulations "should not be amended or altered in any manner which will lessen the comprehensive coverage of such statute in eliminating gender discrimination throughout the American educational system.").

admonished in *North Haven Board of Education* v. *Bell*, 456 U.S. 512, 521 (1982), that "'if we are to give Title IX the scope its origins dictate, we must accord it a sweep as broad as its language'" (quoting *United States* v. *Price*, 383 U.S. 787, 801 (1966)). To effectuate this determination and in light of the powerful role of school authority in teacher-student sexual harassment, it is imperative that Title IX be interpreted to impose liability on school districts under traditional principles of agency.

Consistent with the OCR policy guidance, this Court's prior opinions in sexual harassment cases, and Congress' goals for Title IX, the Court should follow the standard set forth in Section 219(2)(d) of the Restatement and hold that a school district is liable for teacher-student harassment that is either undertaken with actual or apparent authority or is aided by the teacher's relation to the school.

II. EDUCATIONAL INSTITUTIONS SHOULD BE LIABLE UNDER TITLE IX IF THEY FAIL TO PROVIDE EFFECTIVE MEANS FOR REPORTING AND ADDRESSING SEXUAL HARASSMENT, EVEN IF THE HARASSER DID NOT ACT AS AN AGENT OF THE INSTITUTION

In addition to being responsible for the acts of their agents, schools are liable under Title IX for their own wrongful actions. Schools should be liable if they knew or should have known that sexual harassment was occurring in their federally funded programs or activities, but failed to take immediate and appropriate action to end it.[32] Even

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[32] The "knew or should have known" (actual or constructive notice) standard is grounded in traditional principles of agency. *See Restatement (Second) of Agency* § 219(2)(b).

absent actual notice of harassment, schools, like employers, should be held accountable under a constructive notice standard if they fail to take reasonable action to discover and remedy sexual harassment in their programs or activities.

Because sexual harassment is eminently foreseeable,[33] an educational institution, such as the Lago

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[33] Studies have found that the vast majority of female high school students are victims of school-related sexual harassment during their high school careers. In a 1993 survey, 85% of female respondents reported having experienced some form of unwanted sexual behavior directed toward them, and 65% reported that they had been touched, grabbed, or pinched in a sexual way. The American Association of University Women Educational Foundation, *Hostile Hallways: The AAUW Survey on Sexual Harassment in America's Schools* 7-8 (1993) [hereinafter *Hostile Hallways*]. In 1996, a reanalysis of the data from *Hostile Hallways* revealed that, of students who reported experiencing sexual harassment, 44% reported harassment by a member of the school staff other than the principal; 16% reported harassment by a teacher and 2% reported harassment by a principal. *See* Valerie Lee et al., *The Culture of Sexual Harassment in Secondary Schools*, 33 Am. Educ. Res. J. 2 (1996). Similarly, a 1995 Connecticut study reported that 92% of female respondents experienced unwanted sexual behavior directed toward them and 65% reported having been touched, pinched, or grabbed in a sexual way. Permanent Commission on the Status of Women, *In Our Own Backyard: Sexual Harassment in Connecticut's Public High Schools* 10, 12 (1995). In a 1997 Texas study involving grades 7-12, 76% of female respondents reported having suffered pressure to perform a sexual act. Texas Civil Rights Project, *Peer Sexual Harassment: A Texas-Size Problem* 13 (1997). These data also are consistent with studies of sexual harassment at the collegiate level, which have found that almost 70% of female undergraduates experience some form of sexual harassment during their four years of college. Michele A. Paludi, *Editor's Notes, Sexual*

Vista Independent School District, that fails to establish and disseminate an effective policy and procedures for reporting and responding to incidents of sexual harassment should be deemed to have constructive notice of any such harassment that occurs. Application of this standard is imperative to prompt schools to take responsible action to find out about and appropriately address sexual harassment, and thereby to achieve Congress' intent that Title IX root out all forms of sexual discrimination in federally funded educational settings.

As discussed above, following this Court's reference in *Franklin* to the standards articulated in *Meritor*, most of the circuit courts have correctly interpreted Title IX to impose liability on educational institutions under similar agency principles as apply to employers under Title VII. *See supra* note 7. Under well-established Title VII case law, employers are liable for hostile environment sexual harassment when they knew or should have known about the harassment and failed to take appropriate actions to address it.[34] Recognizing Title VII as an appropriate analogue, and based on this Court's opinion in *Franklin*, OCR has adopted the constructive notice standard as part of its Title IX policy guidance.[35]

Harassment on College Campuses 3, 5 (Michele A. Paludi, ed., 1996). *See also,* Roth, *supra* note 16, at 460 (noting that at least one study has found that "between twenty and thirty percent of all female undergraduate students reported having some form of sexual harassment by the faculty and staff of their colleges or universities").

[34] *See, e.g., Ellison* v. *Brady*, 924 F.2d 872 (9th Cir. 1991); *Hall* v. *Gus Constr. Co.*, 842 F.2d 1010 (8th Cir. 1988); *Hunter* v. *Allis-Chalmers Corp.*, 797 F.2d 1417 (7th Cir. 1986); *cf. Snell* v. *Suffolk County*, 782 F.2d 1094 (2d Cir. 1986) (racial harassment).

[35] *OCR Policy Guidance* at 12039.

In this case, Lago Vista's failure to establish and disseminate a policy and procedure for reporting sexual harassment establishes constructive notice because, through that failure, Lago Vista violated its duty to exercise "reasonable care" to find out about the harassment.[36] Lago Vista had no meaningful process whereby Gebser might have sought protection from the harassment to which she was subjected. Because the school district violated its duty to establish and disseminate a policy prohibiting sexual harassment and reasonable procedures for reporting incidents of harassment, Gebser was effectively prevented from seeking help or redress from the school. Indeed, the very failure of the school district to establish a policy and procedure for reporting sexual harassment itself violated Title IX.[37]

Placing schools on constructive notice of sexual harassment based on their failure to issue effective policies and grievance procedures gives schools an incentive to provide meaningful channels for reporting incidents of sexual harassment, and thereby helps send a message to all school employees and students that harassment will not be tolerated. Holding schools liable for failure to provide adequate antiharassment policies and reporting procedures is thus critical to accomplish Congress' objectives.

Such an incentive can also help schools to prevent and remedy sexual harassment. In fact, experience has shown that schools' actions, including adopting and implementing a clear sexual harassment policy and grievance procedures, can reduce the incidence of sexual harassment.[38] Counseling and other prevention programs

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[36] *Id.* at 12042.

[37] *See* 34 C.F.R. § 106-8(b); *OCR Policy Guidance* at 12044.

[38] *See, e.g.,* Elizabeth A. Williams et al., *Impact of a*

also have proven extremely valuable in sensitizing teachers and other school employees to the many forms and harms of sexual harassment, and thereby in reducing the incidence of such harm.[39] School employees may be uncertain how to deal with sexual harassment complaints precisely because schools have neglected to inform and train employees and articulate policies against sexual harassment. As has been demonstrated in the employment context, institutions that maintain effective reporting procedures have less frequently been subject to litigation stemming from incidents of harassment.[40]

University Policy on the Sexual Harassment of Female Students, 63 J. Higher Educ. 50, 57, 59, 62-63 (1992) (finding that continuing and intensive sexual harassment education increased awareness and reduced sexual harassment in schools); Shoop and Edwards, *supra* note 15, at 141-58 (discussing successful programs of sexual harassment prevention).

[39] *See* Anne Bryant, *Sexual Harassment in School Takes Its Toll*, 123 USA Today Magazine 40 (Mar. 1995). *See also* Tasha Lebow, *Successful Harassment Prevention Programs*, 4 Equity Coalition 29 (Spring 1996) (noting that "[i]nstituting prevention strategies insures the most effective use of school time and resources by defusing conflicts before they escalate into serious incidents").

[40] For example, a recent American Management Association study showed that companies that had sexual harassment training programs were less likely to see claims develop into lawsuits. *See Crackdown on Sexual Harassment*, CQ Researcher 625, 633-34 (Vol. 6, No. 27) (July 19, 1996). Other commentators similarly have concluded that a prevention program, including well communicated policies and effective training programs, is the single most important solution to reducing sexual harassment at work. *See* Judith I. Avner, *Sexual Harassment: Building a Consensus for Change*, 3 Kan. J.L. & Pub. Pol'y 57, 74 (1994); Ellen J. Wagner, *Sexual Harassment in the Workplace* 110, 119 (1982).

The emotional, physical and educational harm to students who are sexually harassed, as well as the prevalence of sexually harassing conduct, is well documented.[41] But the harm of sexual harassment does not result only from the incident itself. It is exacerbated by schools' failure to adequately respond to the problem.[42] For this reason, schools must be held to have constructive notice of sexual harassment if they fail to make all reasonable efforts to discover sexual harassment, including establishing and distributing effective policies and procedures addressing sexual harassment and appropriate measures to minimize consequent harms.

A standard of constructive notice under Title IX is particularly essential because many -- if not most -- students may be afraid to report incidents of sexual harassment by teachers and other school employees. Survey data confirms that "students do not routinely report sexual harassment incidents to adults."[43] Fear of retaliation or isolation is a familiar culprit. Some victims do not report harassment out of fear they will be accused of having caused the harassment. In fact, students who report

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41 *See, e.g.*, Bernice R. Sandler, *The Chilly Classroom Climate: A Guide to Improve the Education of Women*, 15-17, 19 (Nat'l Ass'n for Women in Educ. 1996) (sexually offensive hostile environments may reduce female students' class participation and even cause women to drop out of classes entirely); *Hostile Hallways*, *supra* note 33, at 16-17 (64% of the girls who had been harassed reported suffering from embarrassment; 52% of them reported feeling self-conscious; 43% of them felt less sure or less confident about themselves; and 30% of them doubted whether they could ever have a happy romantic relationship).

42 *See* Roth, *supra* note 16, at 466-69 (1994).

43 *Hostile Hallways*, *supra* note 33, at 14.

incidents of sexual harassment by a teacher commonly face ostracism by students, teachers, and others in the community.[44] Many students blame themselves for causing harassment.[45] In lieu of reporting incidences of sexual harassment, students resort to a variety of coping strategies.[46] Courts should not permit schools to capitalize on students' reluctance to report sexual harassment by limiting schools' liability to instances where they have actual notice.

By rejecting a constructive notice standard and limiting school liability to instances of actual notice,[47] the Fifth Circuit has created the perverse incentive for schools to ignore indicia of sexual harassment and discourage students from reporting incidents of harassment.[48] Schools held to the Fifth Circuit's standard will simply bury their heads in the proverbial sand, allowing sexual harassment to proceed unchecked and unaddressed. Congress cannot

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44 Carol Shakeshaft and Audrey Cohan, *Sexual Abuse of Students by School Personnel*, 76 Phi Delta Kappan 512, 519 (1995).

45 *See* Eleanor Linn et al., *Bitter Lessons for All: Sexual Harassment in Schools*, in James T. Sears, ed., *Sexuality and the Curriculum: The Politics and Practices of Sexual Education* (1992).

46 Vita C. Rabinowitz, *supra* note 13, at 204-206.

47 *See Doe* v. *Lago Vista Indep. Sch. Dist.*, 106 F.3d 1223, 1225 (1997); *Rosa H.*, 106 F.3d at 656.

48 Indeed, even with respect to actual notice, the Fifth Circuit adopted an overly restrictive standard that effectively negates Title IX's prohibition of sexual harassment. *See Canutillo Indep. Sch. Dist.* v. *Leija*, 101 F.3d 393, 398-400 (5th Cir. 1996) (holding that notice to a homeroom teacher did not constitute actual notice to school district).

have intended that Title IX be interpreted to allow such a result.[49]

CONCLUSION

This Court should reverse the decision of the Fifth Circuit below and, consistent with its own precedent and Congress' intent, hold that federally funded educational institutions may be liable under Title IX based on agency principles, including for teacher-student harassment facilitated by actual or apparent authority and for failure to take reasonable action to discover and address sexual harassment within their programs and activities.

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[49] While a school's failure to establish reasonable procedures for reporting sexual harassment renders it liable under Title IX, the existence of such procedures will not immunize the school from liability where the harasser acted as an agent of the school, or where the school otherwise had actual or constructive notice of the harassment, yet failed to take prompt and appropriate corrective action. *See OCR Policy Guidance* at 12039-40; *cf. Meritor* (mere existence of a grievance procedure does not shield an employer from liability for sexual harassment). Indeed, because of the reluctance of students to report sexual harassment by teachers and other school authorities, providing such immunity would eviscerate Title IX's protection against sexual harassment.

Respectfully submitted,

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Appendix

Alida Star Gebser and
Alida Jean McCullough* v. *Lago Vista
Independent School District

Amici Statements of Interest

The *National Women's Law Center ("Center)* is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from al facets of American life. Since its inception in 1972, the Center has worked continuously to ensure equal educational opportunities for girls and women through legislative and administrative advocacy, public education and litigation to enforce Title IX. The Center has been a leader in advocating for the full enforcement of Title IX, and has actively participated in Congressional efforts to amend the Act and every Supreme Court case interpreting Title IX, including filing the lead *amicus* brief in *Franklin* v. *Gwinnett County Pub. Sch.*, 112 S. Ct. 1028 (1992). The Center is counsel in *Davis* v. *Monroe County Bd. Of Educ.*, 74 F.3d 1186 (11th Cir. 1996), *rev'd*, 120 F.3d 1390 (1997), Petition for a Writ of Certiorari filed Nov. 19, 1997, No. 97-843, a peer sexual harassment case involving similar issues of Title IX's application to sexual harassment in schools. In addition, the Center has played a major role in shaping the law of sex discrimination and sexual harassment in the workplace under Title VII, participating as *amicus* in every Title VII sex discrimination case in the Supreme Court, including *Meritor Savings Bank* v. *Vinson, 477 U.S. 57 (1986), and* Harris v. *Forklift Sys., Inc.*, 114 S. Ct. 367 (1993), and in numerous sexual harassment cases in the lower courts. The Center has a deep and abiding interest in ensuring that

women and girls have access to a school environment that is free from sexual harassment and abuse.

For well over a century, the *American Association of University Women ("AAUW")*, an organization of 160,000 members, has been a catalyst for the advancement of women and their transformations of American society. In more than 1,600 communities across the country, AAUW members work to promote education and equity for all women and girls. Current legislative priorities include gender equity in education, reproductive choice, and workplace and civil rights issues. AAUW believes that Title IX is essential for continuing the advancement of women and girls in education. As a leader of several coalitions, AAUW plays a major role in activating advocates nationwide for AAUW's priority issues.

The *California Women's Law Center ("CWLC")* is a private, nonprofit public interest law center specializing in the civil rights of women and girls. The California Women's Law Center was established in 1989 to address the comprehensive civil rights of women and girls in the following priority areas: sex discrimination, including sex discrimination in education, reproductive rights, family law, violence against women, and child care.

The *Center for Women Policy Studies ("Center")* is a national, nonprofit, multiethnic and multicultural feminist policy research and advocacy institution. The Center has been a leader in research, policy analysis and advocacy on violence against women since its founding in 1972. In 1993, the Center began an examination of girls' experience with violence. To bring the voices of girls and teenage women into the public policy debate about youth violence, the Center conducted focus group research and a national survey of readers of two girl-focused magazines. Based on

its research, the Center believes that there is an important connection between girls' victimization and their increasing willingness to fight back through violence. A major goal of the Center's work is to advocate for policies in schools that seriously confront and stop girls' victimization as soon as it starts.

The purpose of the *Clearinghouse on Women's Issues* is to exchange and disseminate educational information and materials on issues related to discrimination on the basis of race, sex, age or marital status, with particular emphasis on public policies affecting the economic and educational status of women. The organization may take action or positions in the name of the group, and it provides information to member organizations and individuals on specific issues.

The *Connecticut Women's Education and Legal Fund, Inc. ("CWEALF")* is a nonprofit, women's rights organization incorporated in 1973. With a present membership of over 1,400, CWEALF's mission is to end sex discrimination and to empower all women to be full and equal participants in society through a combination of the law, public policy and community education. For most of its history, CWEALF has worked on the issue of sexual harassment by providing one-on-one assistance to women and by offering workshops on sexual harassment prevention to schools and businesses. From the thousands of women who call CWEALF with stories of sexual harassment and the countless number of students who have related their personal accounts, the organization is well aware of the devastating impact of such behavior and is committed to eradicating it.

Now in its twenty-fourth year, *Equal Rights Advocates ("ERA")* is one of the country's oldest women's law

centers. ERA is dedicated to empowerment of women through the establishment of their economic, social and political equality. Beginning in 1974 as a teaching law firm specializing in issues of sex-based discrimination, ERA has evolved into a legal organization with a multifaceted approach to addressing women's issues including litigation, advice and counseling, public education and public policy initiatives. Since its early days, ERA has worked to end sexual harassment. ERA represented the plaintiff in the first case in the Ninth Circuit to find sexual harassment a violation of Title VII, *Miller* v. *Bank of America*, 600 F.2d 211 (9th Cir. 1979). More recently, ERA filed an *amicus* brief before the United States Supreme Court in *Harris* v. *Forklift Sys. Inc.*, 510 U.S. 17 (1993). ERA was co-counsel in *Doe* v. *Petaluma City Sch. Dist.*, 830 F. Supp. 1560 (N.D. Cal. 1993), and has appeared as *amicus* in numerous cases concerning girls' rights to be free from sexual harassment and sexual discrimination in the schools, including *Franklin* v. *Gwinnett County Pub. Sch. Dist.*, 503 U.S. 60 (1992), and *Davis* v. *Monroe County Bd. of Educ.*, 74 F.3d 1186 (11th Cir. 1996).

Since 1899, the *National Association for Girls and Women in Sport ("NAGWS")* has championed equal funding, high quality, and respect for women's sports programs and generally has promoted opportunities for girls and women in education and athletics. NAGWS is a nonprofit, educational organization whose members are administrators, teachers, coaches, and officials. Therefore, we are naturally concerned with the outcome of this particular case in the education sphere. The ramifications of Title IX decisions may affect not only the world of academia but also the world of athletics. A level playing field cannot be created for women in sport or society if the school systems in which our children are taught do not have

policies for receiving and addressing sexual harassment complaints. Without a way to voice complaints in sexual harassment cases, which overwhelmingly victimize women, girls and women will remain silenced. A finding for the plaintiff in *Alida Star Gebser and Alida Jean McCullough* v. *Lago Vista Independent School District* will reinforce our efforts to provide a level playing field for girls and women.

The *National Coalition for Sex Equity in Education ("NCSEE")* is an organization of educators and gender equity advocates from across the United States. Its purpose is to provide leadership in the identification and in the infusion of sex equity into all educational programs and processes. In recent years, NCSEE has been actively involved in providing technical assistance and training to school districts on how to address and prevent sexual harassment in schools. NCSEE believes that a school district should be liable when a teacher uses his or her delegated authority to harass a student or when the school knew or should have known of the harassment and failed to take prompt and appropriate action.

NOW Legal Defense and Education Fund ("NOW LDEF") is a leading national, nonprofit, civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of the National Organization for Women. A major goal of NOW LDEF is to eliminate barriers that deny women and girls equal opportunities, such as sexual harassment. For years, NOW LDEF has fought for educational equity for girls. In April 1993, NOW LDEF and the Wellesley College Center for Research on Women released results of a survey on sexual harassment in schools. NOW LDEF was co-counsel in

Doe v. *Petaluma City School District*, 830 F. Supp. 1560 (N.D. Cal. 1993), *reconsid. granted*, 949 F. Supp. 1415 (N.D. Cal. 1996), the first case in which a court recognized that a school's failure to respond to peer sexual harassment may violate Title IX. NOW LDEF has appeared as *amicus* in numerous cases concerning girls' rights to be free from sexual harassment and sex discrimination in the schools, including *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), and many appellate court decisions concerning school liability under Title IX for sexual harassment of students. NOW LDEF currently is "of counsel" in *Faragher* v. *City of Boca Raton*, a workplace sexual harassment case pending before this Court, which raises many of the same liability issues before the Court here.

The *Southern Coalition for Educational Equity ("SCEE")*, founded by Winifred Green in November 1978, has as its goal increasing options for all children by assuring access to high quality education, health care, and early intervention programs. The primary emphasis of the SCEE has been to make public schools safe, effective, humane institutions that increase options for all children. From its earliest days, and increasingly in the past five years, the SCEE's programs and projects have sought to address in a more comprehensive manner the problems of children and families.

Wider Opportunities for Women ("WOW") is a national, nonprofit organization, based in Washington, DC, which works to achieve economic independence and equality of opportunity for women and girls. WOW considers sexual harassment to be a barrier to women's educational and workplace equity, and the organization has repeatedly worked to support the safety of women and girls in both work sites and education settings. WOW views sexual

harassment in the classroom as the stage-setter for harassment that occurs in other sectors of society and has long supported the notion that employers are liable for the actions of their employees in cases of this type. For these reasons, we are interested in and have joined the *amicus* brief for *Alida Star Gebser and Alida Jean McCullough* v. *Lago Vista Independent School District*.

Women Employed is a national organization of working women, based in Chicago, with a membership of 2,000. Since 1973, the organization has assisted thousands of working women with problems of sex discrimination. Women Employed works to empower women to improve their economic status and to remove barriers to economic equity through advocacy, direct service and public education. Women Employed strongly believes that one of the most fundamental guarantees that women and girls are entitled to under Title IX is equal educational opportunity, free from sexual harassment. From experience counseling both students and school districts committed to preventing sexual harassment, Women Employed submits that the only way to achieve this guarantee is to hold the school district liable where a teacher invokes his or her delegated authority, either implicitly or explicitly, to sexually harass a student, or where the school district knew or should have known of harassment and failed to take action.

The *Women's Law Project ("WLP")* is a nonprofit, public-interest legal center located in Philadelphia, PA. Founded in 1974, the WLP works to abolish discrimination and injustice and to advance the legal and economic status of women and their families through litigation, public policy development, public education and individual counseling. The WLP is committed to ending the sexual abuse and harassment of women and children and to safeguarding the legal rights of women and children who experience sexual

abuse. Toward that end, the WLP is interested in ensuring a proper remedy for students who are subject to sexual harassment.

The *Women's Legal Defense Fund ("WLDF")* is a nonprofit, national advocacy organization founded in 1971 to advance the rights of women. WLDF promotes fairness in the workplace, quality health care, and policies that help women and men meet both work and family responsibilities. WLDF volunteer lawyers represented the plaintiff in *Barnes* v. *Costle*, 561 F.2d 983 (D.C. Cir. 1977), one of the first federal appellate holdings that sexual harassment may violate Title VII of the 1964 Civil Rights Act, and have participated as *amicus curiae* in every sexual harassment case that has come before the U.S. Supreme Court.

The *YWCA of the U.S.A.* is the oldest women's membership organization in the nation. Founded in 1858, it currently serves over two million girls, women and their families through 400 YWCAs in 4,000 locations across the country. Strengthened by diversity, the Association draws together members who strive to create opportunities for women's growth, leadership and power in order to attain a common vision: peace, justice, freedom and dignity for all people. Because we advocate for public policies that ensure women who have been sexually harassed the right to equal protection and the avoidance of further abuse, the YWCA of the U.S.A. supports the position taken in this *amicus curiae* brief.